

1 Defendants hereby submit the following Reply Brief of Memorandum of
2 Points and Authorities in support of their Motion for Summary Judgment, and an
3 Opposition to Plaintiff's Application for an Order Continuing Defendants Motion for
4 Summary Judgment.

5 DATED: May 2, 2011

6 Respectfully submitted,

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8 City Attorney

9 By: 

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12 Attorney for Defendants CITY OF
13 BURBANK BURBANK POLICE
14 DEPARTMENT, BURBANK
15 POLICE OFFICERS ADAM
16 BAUMGARTEN AND MICHAEL
17 EDWARDS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case relates to the April 10, 2009 arrest of Plaintiff Preston Smith. Following his arrest, Plaintiff pled guilty to violating California Penal Code § 148(a)(1) – interfering with a peace officer in the lawful performance of his duties. Plaintiff also pled guilty to the possession of a controlled substance.

Plaintiff's Complaint alleges that the defendants used excessive force against him during the course of the arrest. The Complaint is barred as a matter of law by the doctrine set forth in *Heck v. Humphrey*, because any finding in favor of Plaintiff would necessarily invalidate the Plaintiff's criminal conviction.

As discussed in detail below, Plaintiff's criminal conviction was for **all** of the events in which he interacted with defendants Edwards and Baumgarten prior to his arrest. Plaintiff's conviction is based on his fleeing from Officer Gunn, his physical resistance to Officer Gunn and defendants Edwards and Baumgarten, and Plaintiff's striking and attempts to strike defendants Edwards and Baumgarten. Because the criminal record is so comprehensive as to show that all of the events are subject to Plaintiff's criminal conviction, all of Plaintiff's claims are barred.

Plaintiff's opposition relies heavily on the recent Ninth Circuit opinion of *Hooper v. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011). The opposition argues that the sole basis for Plaintiff's criminal conviction occurred was when he ran from Officer Gunn. This contention is in direct contravention to the explicit language from the underlying criminal case, which established three specific factual bases for Plaintiff's criminal conviction. Because Plaintiff is directly challenging the three bases for his criminal conviction, *Hooper* does not support Plaintiff's position and the bar of *Heck v. Humphrey* applies to this action.

II. BECAUSE THE OPPOSITION DEMONSTRATES THAT PLAINTIFF IS CHALLENGING THE BASIS FOR HIS CRIMINAL CONVICTION, ALL OF HIS CLAIMS ARE BARRED BY HECK V. HUMPHREY.

1 As set forth in the moving papers, “[w]hen a plaintiff who has been
 2 convicted of a crime under state law seeks damages in a § 1983 suit, the district
 3 court must consider whether a judgment in favor of the plaintiff would necessarily
 4 imply the validity of his conviction or sentence.” *Hooper v. County of San Diego*,
 5 629 F.3d 1127, 1130 (9th Cir. 2011) (internal quotations and citations omitted). “If
 6 the answer is yes, the suit is barred.” *Id.*

7 Plaintiff’s opposition relies on *Hooper*, but that case does not support
 8 Plaintiff’s position. In *Hooper v. County of San Diego*, the plaintiff pled guilty to a
 9 violation of California Penal Code § 148(a)(1). *Id.* at 1129. The plaintiff was
 10 arrested on suspicion of petty theft and for possession of methamphetamines. *Id.*
 11 She did not dispute the lawfulness of her arrest, nor did she dispute that she
 12 resisted arrest. *Id.* Instead, she contended that the arresting officer used excessive
 13 force in response to her arrest. *Id.* In *Hooper*, a police dog eventually bit the
 14 plaintiff’s head on two occasions during a struggle following her arrest. *Id.*

15 In this action, Plaintiff is challenging the factual basis for his criminal
 16 conviction. As clearly outlined in the moving papers, there are three distinct
 17 factual bases for Plaintiff’s criminal conviction. The criminal complaint
 18 specifically alleged that Plaintiff committed the following acts of resistance:

- 19 • Plaintiff ran from Officer Gunn during a lawful detention and despite
 20 orders to stop. Criminal Complaint.
- 21 • Plaintiff used elbows and hands in a fist to strike Officer Baumgarten,
 22 Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn
 23 during the officers’ attempt to lawfully restrain Plaintiff.
- 24 • Plaintiff flailed arms and kicked legs when Officer Baumgarten, Officer
 25 Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn tried to
 26 detain him.

27 The documents in the underlying criminal file show that Plaintiff’s plea was
 28 not limited in any manner. By pleading guilty to violating California Penal Code §
 148(a)(1), he pled guilty to all of the facts alleged against him.

1 In his opposition, Plaintiff is directly challenging two of the three factual
 2 bases for the conviction. In his own declaration, Plaintiff claims that he “remained
 3 face down on the ground and [he] did not attempt to move or stand up” after he
 4 was apprehended by the officers. Declaration of Preston Smith, ¶ 3. Furthermore,
 5 he contends that “he resisted arrest by fleeing the officers” but “he was tasered
 6 even though he was under their physical control and was not resisting arrest.”
 7 Opposition at 14:11-16. Because Plaintiff contends that he did nothing to violate
 8 California Penal Code § 148(a)(1) other than run from the police, he is directly
 9 challenging two of the three factual bases for his criminal conviction.

10 Under any circumstances, the “facts” plaintiff relies on to impeach the
 11 criminal conviction, to wit: he was tasered by Officer Gunn, has no import to
 12 defendants’ Edwards and Baumgarten’s lack of liability. These officers cannot be
 13 held liable for the actions of Officer Gunn.

14 Any finding in Plaintiff’s favor in this litigation would necessarily imply that
 15 his criminal conviction was invalid, which warrants the dismissal of Plaintiff’s
 16 claims. And any attempt to impeach the criminal conviction against the defendants
 17 is meritless.

18 **III. PLAINTIFF’S REQUEST FOR A CONTINUANCE OF THE**
 19 **HEARING SHOULD BE DENIED.**

20 On February 28, 2011, the parties filed a Stipulation with the Court
 21 requesting a stay of the action due to a pending criminal investigation by the Los
 22 Angeles Sheriff’s Department. Docket No. 19. In the Stipulation, the parties
 23 explained their competing position on the issue of whether the Court should hear
 24 the *Heck* motions while the case was stayed.

25 Defendants contended that the “*Heck* motions will be based upon the
 26 pleadings in this action and the court file in the underlying criminal action against
 27 Plaintiff PRESTON SMITH” and “that Plaintiff does not need to conduct
 28 discovery to oppose the *Heck* motions.” Docket No. 19, ¶ 9. Plaintiff contended
 that “the depositions of the individual Defendants must be completed before

1 Plaintiff can oppose the *Heck* motions.” *Id.*, ¶ 10. The Court’s Order contained
 2 the language proposed by Defendants, which scheduled the Motions for May 16,
 3 2011.

4 Additionally, the only basis for Plaintiff’s Application is his contention that
 5 Rule 56(d) of the Federal Rules of Civil Procedure applies. However, defendants’
 6 Edwards and Baumgarten raised no facts, and submitted no declarations, which is
 7 tantamount to a Motion for Judgment on the Pleadings under Rule 12(c), Federal
 8 Rules of Civil Procedure. The court may consider, on a motion for judgment on
 9 the pleadings, the facts alleged in the pleadings as well as those contained in
 10 judicially noticed materials. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d
 11 971, 981, n. 18 (9th Cir. 1999). Therefore, discovery is unwarranted under the
 12 facts and circumstances presented here.

13 **IV. CONCLUSION.**

14 For the foregoing reasons, defendants requests that the Court grant summary
 15 judgment.

16 DATED: May 2, 2011

17 Respectfully submitted,

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